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91-1687

Case No. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIAM D. BLANKINSHIP AND
WILLIAM GREGORY BLANKINSHIP,

Petitioners,

vs.

CINCO ENTERPRISES, INC.

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS AFTER DISCRETIONARY DENIAL OF REVIEW BY BY THE SUPREME COURT OF THE STATE OF OKLAHOMA

Elvin J. Brown
117 East Main Street
Norman, Oklahoma 73069
Tel. No. 405/321-3341

ATTORNEY FOR PETITIONERS

April, 1992

QUESTIONS PRESENTED

1. Did Congress or this Honorable Court intend to make the Federal Deposit Insurance Corporation (FDIC) "a holder in due course" of all the commercial papers it acquires as receiver of insolvent banks, or only under special circumstances?

2. What federal privileges and immunities, if any, of FDIC pass to its assignee when it assigns a note by stamping on its face, ". . . assign all rights, title and interest without representation, warranty or recourse . . . "?

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JURISDICTION STATEMENT

The Final Order and Judgment of the Court of Appeals of the State of Oklahoma was entered on September 10, 1991. The Court of Appeals denied Petitioner's request for rehearing on Oct. 28, 1991. The Supreme Court of Oklahoma denied certiorari on January 23, 1992. No rehearing from the denial of certiorari is permitted under Oklahoma Supreme Court's Rules. Rule 3.17, Title 12, Chapter 15, App. 3, Oklahoma Statutes.

Petitioner respectfully asks this Court for review through Certiorari, as authorized by 28 U.S.C. §1257(3), and provided for by the Revised Rules of the Supreme Court of the United States.

STATUTES AND RULES INVOLVED

The following statutes are involved in this Petition:

12 U.S.C. §1823(e);

28 U.S.C. §1257(3);

Title 12, Chapter 15, App.3 (Rule 3.17);

Title 12 O.S. 1981, §3-302;

Title 12A O.S. 1981, §3-304(1)(a);

Title 12A O.S. 1981, §3-306(b); and

Title 12A O.S. 1981, §3-307(3).

These statutes and Rules are set forth verbatim in the Appendix.

STATEMENT OF THE CASE

Petitioners were signer and co-signer of a note to Norman Bank of Commerce (NBC), for the purchase of a pickup truck by signer. After making numerous payments, the signer lost his job, and they voluntarily surrendered the pickup to NBC in lieu of foreclosure. It was ostensibly sold and the deficiency on

the note was collected by offset from the co-signer's checking account maintained at NBC. Petitioners received no further demands or notices from NBC, and understood their note was fully paid and satisfied.

NBC later became insolvent and the Federal Deposit Insurance Corporation (FDIC) took it over as receiver. Respondent in a bulk transaction purchased a package of defaulted notes from FDIC, which erroneously included the note signed by Petitioners. However, FDIC had stamped a disclaimer on the face of the note stating it was assigned to the Respondent "without representation, warranty, or recourse."

Respondent then sued Petitioners to collect an alleged arrearage on the note. Petitioners asserted in the trial court that Respondent was not a holder in due

course under the Oklahoma Commercial Code, took the note from FDIC subject to all defenses Petitioners had against NBC, and in particular, that the note was paid. Petitioners alleged the impossibility of FDIC being a holder in due course, and further asserted by counterclaims that the Respondent wrongfully sued them and was liable for malicious prosecution, negligence, bad faith, breach of continuing fiduciary duty, and attempted extortion. Respondent thereafter dismissed its claim without prejudice, moved for summary judgment on the counterclaims, and the trial court sustained it. The Court of Appeals affirmed the trial court on appeal, and denied rehearing. The Oklahoma Supreme Court denied certiorari on Jan, 23, 1992, although four of the nine justices voted for review.

Preservation of Federal Question:

The federal question Petitioners assert is the non-status of Respondent as a holder in due course, which it claims by virtue of FDIC's assignment, and which must be answered by federal law. Petitioners first raised this question in the trial court in their "Response to Plaintiff's Motion For Summary Judgment," filed Feb. 27, 1989, (Record @ 81-107). On page 85, the Petitioners urged:

> ". . . (Respondent) had the burden of establishing that it and anyone under whom it claimed was a holder in due course 12A O.S.A. 3-307(3). This, it has not done. It would be impossible for FDIC to have been a holder in due course, too." (emphasis added).

The trial court did not pass on this issue.

Petitioners raised the same issue in their Petition In Error on appeal, under ISSUES AND ERROR PROPOSED TO BE RAISED ON

APPEAL, Exhibit "C" thereof, and in their Brief In Chief, pgs. 6-8, filed on Oct. 3, 1989. Respondent in its Response (answer) Brief, filed on Nov. 13, 1989, addressed it on pgs. 8-13. Respondent asserted on pg. 11:

> "In addition to the Supreme Court's decision in D'Oench [315 U.S. 447 (1942)], the Court in Gunter v. Hutcheson, supra, [674 F.2d 862 (11th Cir. 1982)] has fashioned a new "federal common law" rule. Its effect is to give the FDIC the status of a "holder in due course," even though under the U.C.C. definition the agency would not be entitled to such status."

In Petitioner's Reply Brief, filed Dec. 11, 1989, pgs. 9-15, the above assertion of federal law was refuted. On page 9-12, Petitioners said:

> "(Respondent) asserted further that FDIC is granted a 'super-creditor' status under D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942); 12 U.S.C., §1823(C); and Gunter v. Hutcheson (11th Cir. 1982) 674 F.2d 862. Again, this Court is left to presume that the so called 'super-creditor'

status is equivalent to that of a holder in due course!

None of the authorities cited by the Appellee hold FDIC to be a holder in due course. In fact, the need to create these defenses by the Courts and Congress arose because FDIC was NOT a holder in due course or immune from any defenses. It was deemed necessary under public policy to provide certain privileges and immunities to FDIC for proper discharge of its national duty. The Rule of D'Oench, supra, favors FDIC whenever there is a dispute on the undisclosed terms of the agreement. The court in RSR Properties, Inc. v. FDIC, 706 F.Supp 524 (W.D.Tex. 1989) succinctly stated:

> 'Rule of D'Oench Duhme
>
> Under the rule first announced in the United States Supreme Court's decision of D'Oench Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942), borrowers are estopped to assert alleged 'secret agreements' with a once-solvent bank as defenses to their liability on notes held by the FDIC. Thus the D'Oench Duhme doctrine is a rule of estoppel which has been interpreted by subsequent Courts to create an irrefutable presumption in favor of the bank on the date of insolvency represent the

> true agreement between the parties.'

The above Rule is codified by Congress in 12 U.S.C. §1823(e) as follows:

> '(e) **Agreements against interests of Corporation.** No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an inverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.'

Neither the D'Oench rule nor the statute [12 U.S.C.A., §1823(e)] confer the status of the holder in due course in FDIC. They merely provide protection to FDIC from

secret or oral agreements of which FDIC could not have any knowledge. [Respondent] did not cite any authority for its opposite conclusion. Gunter v. Hutcheson, supra, on which it relies, merely extends the protection of D'Oench to the cases where state and common-law fraud claims are asserted on a note acquired by FDIC without actual knowledge of fraud at the time of acquiring the note. Gunter does not hold that FDIC has the inherent status of a holder in due course.

The effect of the federal common law on the third parties acquiring notes from FDIC is best summarized by the court in RSR Properties, Inc. v. FDIC, supra, as follows:

> 'The implication of the bar of D'Oench Duhme is that those affirmative defenses and counterclaims which are deemed barred as to the FDIC are equally barred as to NCNB, an entity taking the instruments from the FDIC and under the management of the FDIC. FSLIC v. Murray, 853 F.2d 1251 (5th Cir.1988) and cases cited therein; also FDIC v. Cremona Co., 832 F.2d 959, 964 (6th Cir.1987), cert. dismissed sub. nom. Gonda v. FDIC, ____ U.S. ____, 108 S.Ct. 1494, 99 L.Ed.2d 879 (1988).'

There is no allegation or evidence in this appellate record to the

effect that (Respondent) is an entity under the management of FDIC which would take FDIC's instruments insulated from the defenses from which FDIC is protected under D'Oench Duhme, supra."

Further, on pg. 13, the Petitioners said:

"It is clear from the above, that a third party, holding a note, claiming that a defense or counterclaim is barred against it because the note was acquired from FDIC, must show first that the defense or counterclaim is barred as to FDIC itself. Of course, there may be instances where FDIC may validly claim to be a holder in due course, and the same status could flow to the third parties acquiring their notes from FDIC. Herein, [Respondent] has shown that FDIC is protected from a defense of secret agreement, and claims of fraud. From such showing, [Respondent] extended a hasty generalization that FDIC is immune to all defenses on the note! Such conclusions are contrary to the federal common law. . . ."

The Court of Appeals did not pass on the question involving federal law, and later denied rehearing, still declining to confront the federal issue.

On certiorari to Oklahoma Supreme Court (Petition filed on Nov. 18, 1991), Petitioners urged in giving special and important reasons to grant certiorari, that the Court of Appeals left unanswered the disputed question of federal law affecting holders in due course, which both parties to the appeal had deemed dispositive. (Petition for Certiorari, pg. 2). The Oklahoma Supreme Court decided not to review the question, although four justices voted to do so.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS LEFT AN ESSENTIAL FEDERAL QUESTION UNDECIDED

The fundamental question in this case is the status of the Respondent as a holder in due course. Unless the law completely disregards FDIC's limiting

words of assignment ("without representation, warranty or recourse,") Respondent must be deemed to have purchased the note subject to all defenses of any party which would be available on a simple contract. Title 12A O.S. 1981, §3-306(b). Further, FDIC's firm refusal to make any representation, warranty or to allow recourse on the note was made unmistakably clear by stamping it on the face of the instrument. Such stamp made the note "highly irregular" for commerce and imputed notice of possible claims or defenses, under Title 12A O.S. 1981, §3-304(1)(a). That statute says in part:

> "(1) The purchaser has notice of a claim or defense if
>
> (a) The instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so

> irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; . . ." (emphasis added)

Respondent was fully aware of its predicament as not being a holder in due course, and was on statutory notice of possible claims or defenses, so it argued in its Answer Brief filed with Oklahoma Supreme Court that it was entitled to "super-creditor" status as had been awarded FDIC by this Honorable Court in D'Oench Duhme of Co. v. FDIC, supra. For the same proposition the Respondent also relied on 12 U.S.C. §1823(e), and Gunter v. Hutcheson, supra. Respondent urged the Oklahoma appellate courts that under above authorities, Petitioners were estopped to claim the note had been paid against the Respondent since it was an assignee of FDIC.

Petitioners agreed that federal law governing the FDIC has in fact supervened some provisions of the Commercial Code, in deference to federal public policy considerations. However, they further advised the Oklahoma Court that none of the authorities cited by the Respondent held FDIC to be a holder in due course, that this Honorable Court's Rule of D'Oench, supra, favors FDIC only when there is a dispute on the "undisclosed" terms of the agreement; that the statute in 12 U.S.C. §1823(e) was merely a codification of the above rule, and added nothing new to it; and that Gunter v. Hutcheson, supra, held only that the protection of D'Oench may be extended to cases where state and common law claims are asserted on a note acquired by FDIC without actual knowledge of fraud at the time of acquiring the

acquiring the note. No fraud was alleged by the Respondent in this case.

Despite thorough and extensive briefing by both parties, the Court of Appeal's opinion is conspicuously silent on this issue of federal law. No reason was given by the Court of Appeals for avoiding this question, but indeed, this avoidance allowed it to disregard the statutory imputation of notice to the Respondent of possible defenses or claims under the Oklahoma Commercial Code. Petitioners assert that such was not intended by the federal law creating and governing the FDIC. Certiorari must issue to resolve this issue.

II

THIS ISSUE OF FIRST IMPRESSION INVOLVING FEDERAL LAW SHOULD BE RESOLVED BY THIS COURT

The FDIC is a federal agency. Its duties and powers allow it to encroach into and sometimes override the provisions of the Commercial Codes adopted by the states. Deference to the public policies of states require that such intrusions be allowed only with due care and deliberation. Even if we assume correctness of the Court of Appeal's finding that the Petitioners " . . . offered nothing to demonstrate that (Respondent) knew or should have known of these (defenses) at the time it filed suit," the assumption of such a necessity necessarily includes the presumption Respondent was a holder in due course, and wholly ignores the

limitations of "without representation, warranty or recourse" in the assignment of FDIC. If the federal statute and the decision of this Court is to be expanded to give FDIC assignees holder in due course status, notwithstanding the terms of the assignment, then that is a ruling which must come from this Honorable Court.

Petitioners' diligent research did not disclose any federal or state case so holding and negating fundamental provisions of the Commercial Code in favor of FDIC or its assignees. FDIC's entry into an insolvent bank as a receiver must not have an effect on commercial law like a bull's entry into a china shop, wreaking havoc on what has been carefully collected over decades for the orderly conduct of business and commerce.

Trade, industry and the common citizenry rely on commercial codes, and have a right to know in clear and precise terms the scope of federal privileges, if any, which should be allowed an assignee of FDIC, especially when the FDIC itself had declined to make any "representation, warranty or recourse" to its assignee. This Honorable Court should review this issue of first impression.

CONCLUSION

The Court of Appeals, without stating how Respondent acquired either the status of or the equivalency to a holder in due course, ruled despite the federal law cited that Petitioners had failed to show Respondent "knew or should have known" of their possible defenses (rights of a holder in due

course) and were "estopped" to show payment or any other defense or counterclaim.

Thus arises the issues to be tried in this case: Did Congress by statute or this Court by decision intend and grant to FDIC anything more than protection from undisclosed or secret agreements, or fraud, neither of which were involved in this case. And if not, does the assignee of FDIC gain holder in due course rights by virtue of mere assignment from the federal agency, and have to be shown to have notice of payment before it can be a defense under federal law.

Respectfully submitted,

Elvin J. Brown,
ATTORNEY FOR PETITIONERS

APPENDIX

THE COURT OF APPEALS OF THE

STATE OF OKLAHOMA

DIVISION I

(FILED ON SEP. 10, 1991)

CINCO ENTERPRISES, INC.	)	
	)	
Appellee,	)	
	)	
versus	)	72,943
	)	
WILLIAM D. BLANKINSHIP and WILLIAM GREGORY BLANKINSHIP,	)	
	)	
Appellants.	)	

APPEAL FROM THE DISTRICT COURT OF

CLEVELAND COUNTY, OKLAHOMA

HONORABLE MIKE McDANEL, JUDGE

A F F I R M E D

Elvin J. Brown,
Norman, Oklahoma — For Appellants

Charles J. Brackney,
Oklahoma City, Oklahoma — For Appellee.

MEMORANDUM OPINION

Opinion by GLENN D. ADAMS, Judge:

The Blankinships appeal a trial court order granting judgment in favor of Appellee denying the Blankinships' counterclaims for malicious prosecution, negligence, bad faith, and attempted extortion. The Blankinships claims all arise out of Cinco's attempt to collect a note made by the Blankinships to Norman Bank of Commerce. Cinco purchased the note from the Federal Deposit Insurance Corporation after Norman Bank of Commerece failed. After initial discovery and pre-trial motions, Cinco dismissed its action without prejudice, and moved for summary judgment on the Blankinships' counterclaims. Apparently concluding the undisputed facts were consistent only with judgment for Cinco,

the trial court granted the motion. The Blankinships appeal.

In support of its Motion, Cinco filed an affidavit which, if unrebutted, established the following facts as undisputed. Cinco purchased the Blankinships' note from the FDIC as part of package of similar notes, and based its decision to bring an action on the loan file received from the FDIC. The affidavit also established that Cinco was not connected with Norman Bank of Commerce in any manner. According to Cinco's affidavit, a demand for payment was mailed to the Blankinships, but no response was received. After consultation with legal counsel, this action was commenced.

In response, the Blankinships contended much of the affidavit was conclusory and irrelevant and should not be considered. However, the evidentiary

materials filed by the Blankinships demonstrated only that the Blankinships might have had a defense on the note as a result of actions by Norman Bank of Commerce which occurred prior to Cinco's purchase. They offered nothing to demonstrate that Cinco knew or should have known of these actions at the time it filed suit. The essential facts concerning the decision to file the action and the information upon which that decision was made, were undisputed and established that Cinco acted with probable cause and in good faith.

Not only was Cinco's probable cause indisputable on this record, its evidence established the absence of another essential element of a claim for malicious prosecution, i.e. successful termination of the previous action in favor of the malicious prosecution plaintiff. Cinco's dismissal without

prejudice was not a successful termination on the merits for the Blankinships. Glasgow v. Fox, 757 P.2d 836 (Okla. 1988).

The Blankinships' remaining theories for recovery all depend upon their contention that there exists a fact question as to "probable cause." A reasonable belief in the possibility that claim may be valid is sufficient to give a party cause for instituting a proceeding. Young v. First State Bank, Watonga, 628 P.2d 707 (Okla. 1981). As we have already noted, on this record the existence of such a reasonable belief is uncontroverted, and the trial court's order of summary adjudication was appropriate.

Finally, the Blankinships argue the trial court erred in failing to award them attorney fees as "prevailing parties" after Cinco's voluntary

dismissal without prejudice. The factors cited by the Oklahoma Supreme Court in Glasgow to support its conclusion that a voluntary dismissal without prejudice could not support a malicious prosecution action apply with equal force in deciding whether a defendant under similar circumstances is the "prevailing party" under 12 O.S. 1981 §936. The principle articulated in Glasgow required the trial court to reject the Blankinships attorney fee request, and we will not disturb that order.

AFFIRMED.

GARRETT, P.J. and BAILEY, J., concur.

RELEASE FOR PUBLICATION
IN OKLAHOMA BAR JOURNAL

BY ORDER OF COURT OF APPEALS

THE COURT OF APPEALS, DIVISION I
STATE OF OKLAHOMA

October 24, 1992 [FILED OCT. 28, 1991]

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

72,943 - Cinco Enterprises, Inc., Appellee, v. William D. Blankenship and William Gregory Blankinship, Appellants.

The Petition for Rehearing filed by Appellants is DENIED.

. . .

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 24th day of October, 1991.

/s/ James P. Garrett
JAMES P. GARRETT, Presiding Judge

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Thursday, January 23, 1992

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

. . .

72,943 Cinco Enterprises, Inc. v. William D. Blankinship and William Gregory Blankinship. Certiorari denied.
CONCUR: Hodges, V.C.J., Lavender, Simms, Hargrave, Summers, JJ
DISSENT: Opala, C.J., Doolin, Wilson, Kauger, JJ.

. . .

/s/ Marion P. Opala
CHIEF JUSTICE

STATUTES AND RULES INVOLVED

FEDERAL STATUTES

12 U.S.C. §1823(e)

"(e) Agreements against interests of Corporation. No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank."

28 U.S.C. §1257. State Courts; appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> "(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
> "(2) By appeal, where is drawn in question the validity of a statute

of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purpose of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.".

12 O.S. 1981, Chap. 15, App.3, Rule 3.17 Denial of Writ

When a petition for writ of certiorari is denied an order shall be entered to that effect and the mandate shall issue. If writ of certiorari is denied, no petition for rehearing may be filed in the Supreme Court.

12A O.S. 1981, §3-302. Holder in Due Course

(1) A holder in due course is a holder who takes the instrument

(a) for value; and
(b) in good faith; and
(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

(2) A payee may be a holder in due course.

(3) A holder does not become a holder in due course of an instrument:
(a) by purchase of it at judicial sale or by taking it under legal process; or
(b) by acquiring it in taking over an estate; or
(c) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.

(4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased. Laws 1961, p.108, §3-302.

12A O.S. 1981, §3-304(1). Notice to Purchaser

"(1) The purchaser has notice of a claim or defense if
(a) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or

(b) the purchaser has notice that the obligation of any party is voidable in whole or in party, or that all parties have been discharged."

12A O.S. 1981, §3-306. Rights of One Not Holder in Due Course

Unles he has the rights of a holder in due course any person takes the instrument subject to

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an action on a simple contract; and

(c) the defenses of want or failure of consideration, nonperformance of any condition precedent, non-delivery, or delivery for a special purpose (Section 3-408); and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party. Laws 1961, p.109, §3-306."

12A O.S. 1981, §3-307(3). Burden of establishing signatures, defenses and due course.

"After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course."